



2. **The subpoena for the SLC Report is a direct violation of the automatic stay and the Temporary Restraining Order entered in this adversary proceeding (the "TRO").**

The SLC Report relates solely to the merits of the Delaware Causes of Action<sup>1</sup> and is the property of the Debtors. In fact, the report was created by the Debtors in response to a demand letter sent to the Board of Directors of Deep Marine Holdings, Inc. by Mr. Paduano. That letter is attached hereto as Exhibit A. The allegations in that letter are clearly derivative. Nonetheless, defendants FLI Deep Marine LLC, Bressner Partners, Ltd., Logan Langberg, and Harley Langberg (the "Defendants"), all represented by Mr. Paduano, now seek production of the SLC Report in the context of discovery related to a preliminary injunction hearing in this adversary proceeding. However, the Court has already stated that such discovery should *not* go to the merits of the Delaware Causes of Action. The subpoena is a clear attempt to prosecute the Delaware Causes of Action, and therefore is a violation of the automatic stay (as such prosecution is an attempt to exercise control over the Debtors' property) as well as the Court's TRO (as Defendants are specifically prohibited from prosecuting the Delaware Causes of Action).

3. **The subpoena for the SLC Report is a direct attempt to circumvent the rulings of other courts and should therefore be denied.** As Mr. McKim's motion states, the court in *Paul McKim, Individually and Derivatively on behalf of Nominal Defendants Deep Marine Holdings, Inc. and Deep Marine Technology, Inc., v. Nasser Kazeminy, Otto Candies, Jr., John Hudgens, DCC Ventures LLC, Otto Candies LLC, NJK Holding Corporation, Otto Candies III, John Ellingboe, Daniel Erickson, Larry Lenig, Jr., Bruce C. Gilman, Eugene DePalma, and Wade Abadie, Jr.*, Cause No. 2008-64385 in the 129th Judicial District of Harris

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Debtors' Original Complaint and Application for Temporary Restraining Order, Preliminary Injunction and Permanent

County has already ordered that the SLC Report be protected from full disclosure. Furthermore, upon information and belief, the Court of Chancery of Delaware currently has motions before it related to the terms of confidentiality under which the SLC Report should be produced (in connection with the merits of the Delaware Actions). The Debtors realize that the TRO stays Defendants from prosecuting the Delaware Actions. Nonetheless, it is important that this Court note that Defendants' attempt to subpoena the SLC Report in this proceeding is an end run around a matter under consideration in the Court of Chancery of Delaware. To the extent the Delaware Causes of Action are eventually found to belong to the Defendants, the Court of Chancery of Delaware should make the decision regarding the terms of confidentiality of production of the SLC Report.

4. **The SLC Report is completely irrelevant to discovery related to the preliminary injunction hearing.** The Debtors have stipulated that, for the purposes of the preliminary injunction hearing only, all facts in the Delaware Causes of Action shall be deemed to be true. The SLC Report goes only to the facts set forth in the Delaware Complaints, and is therefore irrelevant.

5. **The SLC Report is the property of the Debtors and is subject to attorney-client privilege and attorney work product privilege.** The SLC Report was produced by Special Investigatory and Litigation Counsel hired by the Special Litigation Committee of the Boards of Directors of the Debtors. Mr. McKim acquired the SLC Report only in his former capacity as an officer or director of the Debtors. The attorney-client and work product privileges may *not* be waived by Mr. McKim. Rather the privileges now belong to Mr. John Bittner, current Chief Restructuring Officer. Mr. Bittner does *not* presently waive these privileges. Consequently, the SLC Report should not be produced by Mr. McKim.

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Injunction.

WHEREFORE, premises considered, the Debtors object and respond to the Motion of Paul McKim for Entry of Order Regarding Subpoena, and respectfully request that this Court enter an order prohibiting the production of the SLC Report.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing pleading was served upon the parties listed below by electronic mail on February 4, 2010.

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